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No. 86-166

In the Supreme Court of the United States

OCTOBER TERM, 1986

FRANK AUGUST SYLVIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends (1) that the district court abused its discretion in denying his motions for a bill of particulars and for a continuance; and (2) that the evidence was insufficient to show that he possessed and conspired to possess methamphetamine with the intent to distribute it.

1. Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of conspiracy to possess methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846, and on one count of possession of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to ten years' imprisonment and to a three-year special parole term (C.A. App. 778).[1] The court of appeals affirmed (Pet. App. 28-32).

[1] Co-defendants Lynn Johnson and Edward Barbato were charged with the same offenses; Johnson was also charged with an additional possession count. Before trial, Johnson pleaded guilty to two counts of using a telephone to facilitate the possession of methamphetamine with the intent to distribute, and Barbato pleaded guilty to simple possession (C.A. App. 111, 612). Both co-defendants testified for the government at trial.

a. On June 29, 1985, DEA Agent Bill Callahan went to co-defendant Lynn Johnson's house in Virginia Beach, Virginia, to discuss the sale of methamphetamine.[2] After Johnson showed Agent Callahan a small amount of powder methamphetamine, Callahan asked her if she could procure "rock" methamphetamine, a stronger form of the drug. Johnson agreed, and Callahan promised to call her later. C.A. App. 209-210, 271-275.

On July 11, Agent Callahan had a telephone conversation with Johnson, and she agreed to sell him one ounce of methamphetamine. When Callahan arrived to complete the sale, Johnson explained that she had to leave to obtain the drug from someone else. She then met petitioner at a nearby convenience store to discuss the purchase, while Callahan drove around the neighborhood. Petitioner at first refused to give Johnson the drug before receiving the purchase money, but he ultimately agreed to wait inside Johnson's house while she sold the drug to Callahan outside. The two then returned to Johnson's house; petitioner hid inside and Johnson sat on the front porch while awaiting Agent Callahan's return. After Agent Callahan arrived, Johnson sold him one ounce of methamphetamine for $1700. Johnson also agreed to sell Callahan three more ounces of the drug, and Callahan promised to call her later in the week. C.A. App. 211-218, 276-281, 566-568.

On July 16, 1985, Agent Callahan called Johnson and inquired about the purchase of three ounces of methamphetamine. Johnson replied that she could obtain the drug

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[2] Callahan had previously purchased methamphetamine from one Daniel O'Toole, who had given Callahan a telephone number to call when he needed more of the drug. When Callahan later called the number, Johnson answered and suggested that Callahan come by the house, because she could help him obtain the drug (C.A. App. 208-209, 271-273, 316-320).

and told him to come over to her house as soon as possible. Johnson then called petitioner, who promised that he would arrive with the drug within an hour. Meanwhile, co-defendant Edward Barbato, an auto repair shop owner who was repairing petitioner's truck at the time, offered to give petitioner a ride to Johnson's house. Petitioner accepted the offer, and as the two left Barbato's shop, petitioner gave Barbato two grams of methamphetamine and explained that Barbato should deduct the value of the drug from petitioner's repair bill. C.A. App. 220-223, 281-284, 590-591, 613-617, 646-647.

When Agent Callahan arrived at Johnson's house, Johnson met Callahan at his car and told him that the methamphetamine had not yet arrived. Callahan then placed Johnson under arrest. At that point, Callahan and several other DEA agents and local police officers entered Johnson's house to await the arrival of her supplier. C.A. App. 222-223, 284-287. Petitioner and Barbato arrived at the house shortly thereafter. DEA agent Jack Faddis told them to enter the house and that he needed some identification from them, because there was a police investigation ongoing. Barbato entered first, and a local police detective patted him down for weapons. As petitioner entered the house, Agent Faddis saw petitioner drop his maroon windbreaker jacket. *Id.* at 473-476, 479-480, 481-483. In the jacket, Faddis discovered more than three ounces of methamphetamine (*id.* at 476-477, 485-486, 504-506, 586-588). Another DEA agent then frisked petitioner for weapons and found a small set of scales (*id.* at 454-456). A local police detective also discovered inside Barbato's shirt pocket the methamphetamine petitioner had given him (*id.* at 420, 428, 590-591).

b. On appeal, petitioner's court-appointed counsel filed an *Anders* brief,[3] presenting five issues that arguably might support the appeal. After an independent review of

[3] See *Anders* v. *California*, 386 U.S. 738 (1967).

the record, the court of appeals concluded that petitioner's claims were frivolous and affirmed his convictions. The court also denied petitioner's counsel's request to withdraw from any further representation, because the attorney's responsibilities under the Criminal Justice Act included filing a petition for a writ of certiorari if the client so requested (Pet. App. 30-32).

2. Petitioner raises four of the same arguments that were presented in his *Anders* brief. The court of appeals correctly ruled that petitioner's claims are frivolous.

a. Petitioner argues that the district court abused its discretion in denying his motion for a bill of particulars, which sought clarification whether the methamphetamine described in the conspiracy count was the same drug that was described in the possession count (see C.A. App. 37-38). That claim lacks merit. Petitioner filed his motion several weeks in advance of trial. Before trial began, petitioner again asked the court to require the government to specify whether the methamphetamine described in the conspiracy and possession counts was the same package of that drug. The district court directed the government to answer petitioner's question, and the government replied that three packages of methamphetamine were recovered: one ounce that Johnson sold to Agent Callahan on July 11; three ounces found in petitioner's jacket on July 16; and the small package discovered in Barbato's shirt on July 16. The government explained that all three packages related to the conspiracy charge, but only the methamphetamine found on July 16 related to the possession charge. C.A. App. 109-111.[4] The government therefore clearly dispelled any confusion that petitioner could have experienced in this regard before trial began.

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[4] The district court subsequently ruled that the small amount of methamphetamine that petitioner gave to Barbato would be admitted pursuant to Fed. R. Evid. 404(b) only to show petitioner's motive, opportunity, intent, preparation, and knowledge. The court also instructed the jury to that effect. C.A. App. 656-659, 664-666.

b. Petitioner also claims that the district court erred by denying him a continuance once his co-defendants pleaded guilty. That claim is without merit.

Before trial, petitioner requested a continuance, because of the "complexity of the issues and number of co-defendants" (C.A. App. 25) and because petitioner's counsel had another trial scheduled to begin a few days before the trial in this case (*id.* at 25-26). On the first day of trial, petitioner requested a one week continuance in light of Johnson's and Barbato's "last-minute" guilty pleas (*id.* at 98).[5] Petitioner claimed that, because of their pleas, he did not have an opportunity to interview his former co-defendants or to review their statements and criminal records (*id.* at 98-100). The district court observed that petitioner had ample opportunity to interview Johnson before she entered her plea, because she had been a co-defendant. The court nonetheless stated that it would allow petitioner's attorney several minutes to interview Johnson before trial began, if he so desired (*id.* at 101). The court also found that petitioner had sufficient time to interview Barbato and to plan his trial strategy, because Barbato had pleaded guilty several days before trial (*ibid.*). The government informed the court that it had previously made available to the defense a tape-recorded statement made by Johnson, that Johnson did not have a criminal record, and that the prosecutor had given Johnson's five-page statement to petitioner earlier that morning (*id.* at 102-106). Petitioner then raised a new objection that, in light of Johnson's plea, Johnson's cellmate might be a material witness. The court advised petitioner that the U.S. Marshal would retrieve the cellmate if petitioner so requested (*id.* at 106-107). The court then denied petitioner's motion, on the ground that all the requested information was available to him (*id.* at 107-108).

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[5] Barbato pleaded guilty several days prior to trial; Johnson pleaded guilty on the morning of trial (see C.A. App. 101, 205).

It is clear that petitioner was not prejudiced by the district court's denial of his request for a continuance. The court provided whatever additional information and opportunity to interview witnesses that petitioner claimed he needed to complete his trial preparation. Moreover, petitioner's defense rested primarily upon the fact that several DEA agents and local police officers testified that they did not notice that petitioner was carrying a maroon jacket when he entered Johnson's house (*e.g.*, C.A. App. 339-344, 388-390, 433-434, 459-460, 633); that defense did not rely upon Johnson's or Barbato's testimony. Thus, petitioner was able adequately to present his chosen defense, and he does not now claim that the denial of his continuance motion prevented him from presenting any additional evidence. In these circumstances, the district court did not abuse its discretion in denying his motion. See *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983).

c. Petitioner argues that the evidence was insufficient to show that he possessed the methamphetamine found in the maroon jacket. He claims that he was merely present in the room where the jacket was discovered. The evidence, however, established more than petitioner's mere proximity to the drug. Petitioner promised to deliver three ounces of methamphetamine to Johnson, and on the way to her house he gave Barbato a small sample for his personal use. As petitioner entered Johnson's home, Agent Faddis saw petitioner drop the jacket containing the promised three ounces, and the officers discovered hidden in petitioner's back pocket a set of small scales of the type that is often used in drug purchases. Accordingly, there was ample evidence to support petitioner's conviction for possession of methamphetamine.

d. Petitioner also argues that the evidence was insufficient to support his conspiracy conviction. He concedes that the government need only show that he conspired with one other person, and he admits that Johnson testi-

fied that she and petitioner agreed to sell methamphetamine to Callahan. Petitioner argues, however, that Johnson's testimony was not sufficient by itself to establish a conspiracy. That argument is frivolous. It is well settled that the uncorroborated testimony of an accomplice is sufficient to support a conviction. *Krulewitch* v. *United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring); *Caminetti* v. *United States*, 242 U.S. 470, 495 (1917). In this case, moreover, Johnson's testimony was amply corroborated by the testimony of Agents Callahan, Faddis, and others.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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